No. 5981

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of
GILBERT S. GORDON,
Bankrupt.

India Tire & Rubber Company,
Appellant,

vs.

Carl O. Retsloff, Trustee in Bankruptcy of Gilbert S. Gordon, Bankrupt,
Appellee.

APPELLEE'S BRIEF AND ARGUMENT ON APPEAL.

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RESPONDENT'S BRIEF AND ARGUMENT ON APPEAL.

STATEMENT OF FACTS.

Gilbert Gordon was adjudicated a bankrupt on the 18th day of June, 1928, and thereafter Carl O. Retsloff was duly appointed Trustee. The India Tire and Rubber Company, the appellant in this case, was on or about the 18th day of April, 1928, a creditor of the said bankrupt in the amount of $11,585.38. That in accordance with the evi-

dence adduced upon the original hearing in this matter, this amount had been due and owing to the said India Tire and Rubber Company for many months prior to April 18, 1928. Of this amount there was past due on unpaid trade acceptances $1,464.00 due on January 27, 1928, $317.05 due and unpaid on March 13, 1928, and $2,541.95 due and unpaid on March 27, 1928. These trade acceptances were all dishonored and were part of the original debt of $11,-585.38.

That for a period covering some six months prior to the 18th day of April, 1928, the only payment made by the bankrupt or credit extended to him was for returned goods and discounts, and that on or about the 18th day of April, 1928, appellant, the India Tire and Rubber Company, took from the bankrupt's place of business tires and tubes for which credit was given to the bankrupt on account in the sum of $2,546.84.

Testimony further discloses (Tr. of Rec., p. 42) that the market value of the tires taken back from Mr. Gordon on or about the 18th day of April, 1928, would be worth from 25% to 40% less than the prices on the credit memorandum, and that the credit memorandum bears a statement as follows: "Taken to liquidate account."

That subsequent to the appointment of a Trustee, appellant filed a claim against the estate of the bankrupt in the sum of $9,038.54 to which claim the Trustee objected on the ground that appellant had received a preference within the four months immediately preceding the filing of the petition, and that said appellant had received such preference knowing the bankrupt was insolvent at the time said

preference was given. That thereafter, and on or about the 4th day of February, 1929, a hearing was had before the Honorable F. F. Grant, Referee in Bankruptcy in and for the Southern District of California, Southern Division, for hearing proofs on the objections, and at that time evidence was submitted by the Trustee and by the claimant.

That the said Referee sustained the objections of the Trustee to the allowance of said claim and appellant demanded a review by the District Court of the United States in and for the Southern District of California, Southern Division, and upon the same testimony the District Court made an order affirming the decision of the Referee.

ARGUMENT.

Without deviation or detour, appellant has in its brief, and on page 4 thereof, come immediately to the meat of the action. First, appellant states that before the decision of the Referee and the United States District Court on review shall be sustained it must appear: (a) That the debtor was insolvent at the time of the transaction in question; (b) That the appellant had reasonable cause to believe that the transaction would effect a preference.

It therefore devolves upon us to lay before this Honorable Court the unquestionable proof of both the insolvency of the bankrupt at the time of the transaction, and the appellant's knowledge that the transaction would effect a preference.

Mr. Schwan (who was credit manager of the India Tire and Rubber Company at the time of the transaction in question, but who died prior to the hearing before the Ref-

eree) stated to Mr. Retsloff, the Trustee, (Tr. of Rec., pp. 18 and 19) that he knew Mr. Gordon "was broke" and although this conversation did not take place until the 10th day of July, 1928, and after the adjudication in bankruptcy, it was at the same time that the agreement was reached between the Trustee, the Richfield Oil Company and the India Tire and Rubber Company through its representative, Mr. Schwan, that the Richfield Oil Company would return the preference which they received in the form of a note payable to the bankrupt and all monies collected on said note, and the India Tire and Rubber Company would return all the merchandise taken by them from the bankrupt on or about April 18, 1928. (Tr. of Rec., p. 17.)

From appellant's brief we are inclined to gather that appellant does not understand what Mr. Schwan meant by saying that he knew Mr. Gordon "was broke," and with this thought we respectfully submit that when a word is used to define any particular thing or object and that word is not comprehensible to the person to whom it is directed, it is then necessary for the purpose of obtaining the full intent and enlightenment of the descriptive word, to consult a lexicon if the word be a matter of legal propensity, and a dictionary if in English. And although we know that this court without question is fully advised as to the meaning of the words "was broke" we nevertheless for the purpose of the record desire to give the definition of the word "broke" as laid down in Webster's New International Dictionary of 1927, to-wit: "Ruined financially; bankrupt."

Not only did appellant know that Gordon was financially ruined and bankrupt, but appellant also knew that the bankrupt was sick, and appellant also knew that its account was all past due in the sum of $11,585.38; and appellant also knew that all of the trade acceptances had been dishonored by the bankrupt within the four months preceding the transaction involved; and appellant also knew that on or about the 18th day of April, 1928, and on the day that the property was removed, that the bankrupt had less than $5,000.00 in stock in his place of business; and appellant also knew that the bankrupt was heavily indebted to the Richfield Oil Company.

With the foregoing facts within its possession and knowledge, on and before April 18, 1928, appellant had reasonable cause to believe that Gordon was insolvent on the date the merchandise was removed, to-wit: April 18th, 1928. That upon the uncontradicted evidence of the Trustee and of L. D. Blodgett, it was proven without question that Mr. Schwan agreed to return said merchandise at such time as the Richfield Oil Company returned the preference received by them. Is it reasonable to believe that Mr. Schwan would have agreed to return said merchandise had he not been satisfied that appellant had received a preference as defined by the Bankruptcy Act? Is it reasonable to believe that Gordon was solvent on April 18th, 1928, when appellant removed said merchandise, and after said removal leaving in the place of business of said bankrupt merchandise of the total value at the market price at that time, of less than $1500.00?

There is a long line of cases referred to in Collier's 13th Edition, Vol. 2 at page 1250, particularly 45 American Bankruptcy Reports 373, *Schuetle & Co* vs. *Schwank;* the language of the court is as follows:

> "That a person shall be deemed insolvent whenever the aggregate of his property, exclusive of any property which he may have conveyed or transferred with the intent to defraud his creditors, shall not at a fair valuation be sufficient in amount to pay his debts."

W. S. Storms of the India Tire and Rubber Company testified (Tr. of Rec., pp. 30 and 31) that he went to San Diego from Los Angeles on the 4th day of April, 1928, and told Mr. Gordon that inasmuch as they had approximately five or six thousand dollars worth of merchandise on hand, that this be returned for credit.

R. W. Rawley testified that he was traveling auditor for appellant at the time of the transaction in question and that the market value of the tires taken from Gordon at the time they were taken back, would be from 25% to 40% less than Gordon had agreed to pay for them. This is a matter of computation which would reduce the value of the stock on hand at the time Mr. Storms visited and took the stock from Gordon, to an amount equal to three or four thousand dollars, and it was certainly within the knowledge of appellant that the aggregate of Gordon's property at a fair valuation was insufficient in amount to pay his debts. With the facts before the appellant as hereinbefore set out, we believe that the definition laid down in the case of *McGee* vs. *Branan and Carson Co.,* 5 Am. B. R. (N. S.) 60, fully covers the situation:

> "Where payment was made to a creditor from the proceeds of an insurance policy on the debtor's stock of merchandise under circumstances which strongly indicate a belief in the debtor's solvency, induced solely by his unverified statement as to his assets and liabilities, is not reasonable as the test is not the actual belief of the creditor but the belief that he ought reasonably to have entertained under the facts known to him."

Pursuant to the foregoing facts in the possession of appellant, and in accordance with the above decision, appellant had no alternative other than to have believed Gordon insolvent on April 18th, 1928.

We desire to point out that, considering the brief and argument of counsel in the most favorable light to appellant's case, it is truly an argument for the respondent. That from the transcript and record and from the brief and argument of appellant, this Honorable Court has been shown the facts and circumstances surrounding the whole transaction, and to pick out one or two particular situations, and to hang appellant's case upon these two nails of hope is not the method of arriving at the true situation. This Honorable Court has said that IT IS NOT THE ACTUAL BELIEF OF THE CREDITOR BUT THE BELIEF THAT HE OUGHT REASONABLY TO HAVE ENTERTAINED UNDER THE FACTS AND CIRCUMSTANCES KNOWN TO HIM.

The language of the Referee in the decision of this case as cited in the American Bankruptcy Reports, Volume 13, page 562, with relation to the return of the merchandise to appellant at the same price that the bankrupt agreed to pay

for said merchandise when appellant knew that the merchandise had depreciated from 25% to 40% in value, is more ably said than counsel feels justified in attempting, and for that reason we quote, as follows:

> "The evidence also as indicated above herein, without contradiction, shows that at the time the goods were taken from the bankrupt by claimant they were from 25 to 40 per cent less in value than the price paid by the bankrupt at the time of the sale to him, although the claimant extended to the bankrupt credit in the full amount of the purchase price. On this branch of the case the law seems to be well settled that such an unusual occurrence and manner of attempting to satisfy a debtor's debt is enough to indicate the India Tire and Rubber Company at the time they took the goods from the bankrupt had information as to the debtor's financial condition. It is not customary for merchants to extend bonus credits to their customers as a pastime, and to know that the claimant herein gave the bankrupt about one thousand and no/100 ($1,000.00) dollars credit for nothing, indicates that they had such information concerning the debtor's financial condition and knew he was insolvent.
>
> "In the case of *Bossak & Co.* vs. *Coxe* (C. C. A., 5th Cir.), 49 Am. B. R., 402, 285 F., 147, the court said: 'A transaction whereby a merchant creditor satisfied his debt in consideration of the transfer to him by the debtor of goods worth only half of the amount of the debt certainly is not one in the usual and ordinary course of mercantile business. In effect the appellant relinquished half of an unquestioned debt due to it for the price of goods sold for nothing in return for so doing. Such an unusual occurrence is prima facie evidence of fraud, and was enough to indicate that appellant had information as to the debtor's financial condition, and to cast on the appellant the burden of sustaining the validity of the transaction. *Walbrun* vs.

Babbitt, 16 Wall., 577, 21 L. Ed., 489; *Judson* vs. *Courier Co.* (C. C.), 15 F., 541; *Hodges* vs. *Coleman,* 76 Ala., 103; *Kansas Moline Plow Co.* vs. *Sherman,* 3 Okla., 204, 41 Pac., 623, and note, 32 L. R. A., 33, 58.' *In re Andrews* (C. C. A., 1st Cir.), 16 Am. B. R., 387, 144 F., 922.

"In the last above case cited, the Circuit Court of Appeals of First Circuit says:

'Creditors upon receiving from the bankrupt, within four months period, payment of pre-existing debts, by a return of goods had reasonable cause to believe that he was insolvent and that a preference was intended and must be surrendered before their claims could be allowed.' "

Answering Assignment of Error No. 1.

The proof of the insolvency of Gordon on April 18, 1928, is conclusive in this, that according to the testimony (Tr. of Rec., p. 21) W. R. Wheatley, manager of the India Tire and Rubber Company, wrote to Mr. Blodgett of the Richfield Oil Company, stating that he had been in San Diego and talked with Mr. and Mrs. Gordon, and it was necessary for Mrs. Gordon to have a good salesman but it was unfortunate that they were hardly able under the circumstances to pay a man on a salary basis, and that it was regrettable that this misfortune should be wished on one family. This letter is of April 4, 1928, about ten or twelve days before the transaction involved. Further proof of the insolvency on April 18, 1928, is a fact that the bankrupt was indebted to appellant on that day on past due indebtednesses of six months standing, $11,585.38. That on the same day, to-wit: April 18, 1928, (Tr. of Rec., p. 23) Gordon was indebted to Richfield Oil Company in the sum of $3996.40 on past due indebtednesses. That during the

six months immediately preceding the transaction involved, the bankrupt made no payment to appellant on account of said indebtedness. That it was necessary for a Mr. Lessar, a brother-in-law of Mr. Gordon, in San Francisco, to guarantee a certain bill of goods sold to Gordon by the India Tire and Rubber Company, and that Mr. Schwan, appellant's representative, made a trip to San Francisco in January of 1928 for the purpose of obtaining such a guarantee, but was unsuccessful. That according to the undisputed testimony adduced at the hearing, the property owned by the bankrupt on April 18, 1928, exclusive of that which was transferred, was not, at a fair valuation, sufficient in amount to pay his debts.

Answering Assignment of Error No. 2.

Answering appellant's statement contained on page 17 of appellant's brief and argument, the last paragraph thereon, it would appear that the letter written on April 4, 1928, by the manager of the India Tire and Rubber Company to the manager of the Richfield Oil Company, that the India Tire and Rubber Company expected Gordon to remain in business. Nevertheless, this Honorable Court is respectfully directed to the fact that the letter states in so many words, that they have not the money to pay even one salesman.

Appellant further states on page 18 that even as late as May 8th, Mr. Blodgett consulted with Mr. Schwan of the India Tire and Rubber Company in an attempt to work out a scheme to relieve Gordon's financial condition. It is only right to assume that both appellant and the Richfield

Oil Company should have rendered all assistance possible, even after April 18, 1928, as they both had received preferences, and any effort on the part of either the India Tire and Rubber Company or Richfield Oil Company in an attempt to assist the bankrupt after April 18, 1928, does not change the status of the situation.

Answering paragraph "d", page 19, of appellant's brief and argument, we respectfully submit that this letter was written in March, 1928, by the general manager of the Richfield Oil Company to Mr. Blodgett, and was offered in evidence for the purpose of disclosing the fact that the Richfield Oil Company had consulted with the India Tire and Rubber Company with reference to the condition of the Gordons financially, the last paragraph of which reads as follows:

> "May we ask that you also endeavor to obtain a schedule of liabilities in this case in order that we may know to whom this man is owing and to what amounts. This will put us in position to consult with other large creditors with a view of coming to some mutual understanding to preclude possibility of others attaching the business. We have already consulted with Mr. Wheatley, India Rubber manager for southern California, to this end. They will not press him."

Further answering alleged Assignment of Error No. 2, respondent does not feel that the Bradstreet financial report is of any value and needless to be commented upon.

In the case of *Rosenberg* vs. *Semple* (C. C. A. 3d Cir.), 43 Am. B. R., 671, the court wisely says:

> "Insolvency, owing to its nature, is not always susceptible to direct proof. It may, and in many cases

must be established by the proof of other facts from which the ultimate fact of insolvency may be presumed or inferred."

In the case of *Goetz* vs. *Zeif,* 3 Am. B. R. (N. S.), 532, the court says:

"In determining the question of reasonable cause for belief, facts showing the relation of the parties, their intimacy or lack of it, the usual or unusual nature of the transfer, the opportunities of the creditor for knowledge, the participation of the creditor, if any, in the business of the debtor, the fairness or unfairness of the witnesses as to the disclosure of relevant facts within their knowledge, are all subjects which may be properly considered."

CONCLUSION.

In conclusion we desire to state that appellant is in error when it is stated, on page 28 of appellant's brief and argument, that there is no conflicting testimony in the case at bar, for it would appear from the record that there is considerable conflicting testimony with reference to the solvency or insolvency of Gordon at the time of the transaction involved. However this conflict on the part of appellant be weak, nevertheless there is a conflict.

Respondent feels, however, that it is well taken that this court examine the entire record. But on the first proposition we find, in Volume 3, page 532 of Am. B. R. (N. S.), *Goetz* vs. *Zeif* (195 N. W., 74), this statement:

"Where many of the facts proven in an action to recover a preference were circumstantial, from which conflicting inferences might be drawn, the conclusions of the trial judge that the evidence did not show equitable assignments as claimed, and that the defendant

had reasonable cause to believe that payments would effect a preference, will not be disturbed although the appellate court might have reached different conclusions."

For all the foregoing reasons we ask that the decision of the District Court be affirmed.

Respectfully submitted.

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